



SPECIAL COUNSEL, Petitioner, v. LISA B. WILLIAMS, Respondent, and  
GOVERNOR'S OFFICE FOR INDIVIDUALS WITH DISABILITIES, STATE OF  
MARYLAND, Respondent.

DOCKET NUMBER CB1216920009T1

MERIT SYSTEMS PROTECTION BOARD

*56 M.S.P.R. 277; 1993 MSPB LEXIS 35*

January 21, 1993

**COUNSEL:**

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Lynn Alexander, Esquire, Washington, D.C., for the petitioner.

Alfred Nance, Esquire, Baltimore, Maryland, for the respondent Lisa B. Williams.

Jack Schwartz, Esquire, Baltimore, Maryland, for the respondent Governor's Office for Individuals with Disabilities, State of Maryland.

**OPINION:**

[\*278] BEFORE

Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica M. Parks, Member

**OPINION AND ORDER**

This case is before the Board on a Recommended Decision dated August 24, 1992, issued by the Board's Chief Administrative Law Judge, Edward J. Reidy (CALJ). The decision was issued pursuant to an Office of Special Counsel complaint for disciplinary action against the respondents, Lisa B. Williams and the Governor's Office for Individuals with Disabilities (OID), Williams' employing agency and an executive agency of the state of Maryland. The complaint alleged that respondent Williams, employed by OID as an executive assistant, violated 5 U.S.C. § 1502(a)(3), the Hatch Political Activities Act (Hatch Act), when she was a candidate in a Democratic primary election for member in the Maryland House of Delegates on September 11, 1990. [\*\*2]

The CALJ found that respondent Williams knowingly violated section 1502(a)(3) by her candidacy for partisan elective office. The CALJ also determined, in accordance with 5 U.S.C. § 1505, that the penalty of removal was

warranted.

Respondent Williams filed exceptions to the Recommended Decision pursuant to 5 C.F.R. § 1201.129. These exceptions were essentially the same as the arguments presented to Judge Reidy. In the first two arguments, Ms. Williams contended that she was not covered by the Hatch Act and that the penalty of removal was not warranted. We find that the CALJ adequately addressed these arguments and correctly found that Ms. Williams was covered by the Act and that removal was appropriate.

In her final argument, Ms. Williams contended that the application of the Hatch Act to her case violated the First Amendment. [\*279] In response to this argument, the CALJ properly noted that the Board does not have authority to hold a statute unconstitutional and that the Supreme Court has found the Hatch Act constitutional. Recommended Decision at 6 n.3. Given the fact that the Hatch Act does not violate the Constitution, and given our findings [\*\*3] that Ms. Williams is both covered by the Act and in violation of it, the application of the Act to her cannot violate the First Amendment. *See U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 556 (1973).

Accordingly, we AFFIRM and ADOPT the Recommended Decision as Modified as the final decision of the Board and incorporate it herein.

The Governor's Office for Individuals with Disabilities is hereby ORDERED to remove Lisa B. Williams from her position. 5 U.S.C. § 1505.<sup>1</sup> Pursuant to 5 U.S.C. § 1508, respondents are hereby notified of the right to file a petition for review in the United States district court for the district in which the respondents reside or do business within thirty days of the date of the mailing of this final decision.

\* Pursuant to 5 U.S.C. § 1506(a)(1), if OID fails to remove respondent Williams within 30 days after the date of this Final Decision and Order, the Board shall order the appropriate Federal agency to withhold an amount equal to two years' pay for Ms. Williams from the loans and grants under OID's control. Thus, OID may choose to remove Ms. Williams or to forfeit receipt of Federal funds in an amount equal to two years of her pay. We further note that if Ms. Williams is rehired in a state or local agency in Maryland within 18 months after her removal, then the Board will order a withholding of federal funds in an amount equal to two years of Ms. William's salary. 5 U.S.C. § 1506(a)(2).

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The Special Counsel is ORDERED to notify the Board within 30 days of this final decision whether respondent Williams has been removed as ordered, unless this decision is stayed and respondent is suspended in accordance with 5 U.S.C. § 1508. It is FURTHER ORDERED that, after the first submission, the Special Counsel shall thereafter submit to the Board, at three six-month intervals, evidence that respondent has not been reemployed by any state or local agency in the State of Maryland for a period of 18 months, as provided in 5 U.S.C. § 1506.

This is the final decision and order of the Merit Systems Protection Board.

DATE: August 24, 1992

[\*280] BEFORE

Edward J. Reidy, Chief Administrative Law Judge

RECOMMENDED DECISION

INTRODUCTION

This proceeding is a Complaint For Disciplinary Action against respondents Lisa Williams individually and Governor's Office for Individuals with Disabilities nominally, filed February 19, 1992 by the Special Counsel (SC).

Petitioner charges that Williams violated 5 U.S.C. § 1502(a)(3) (the Hatch Act) by becoming a candidate for public office in a partisan [\*\*5] election. Asserting that Williams was employed by the State of Maryland in a position with an executive agency which received federal monies in the form of grants from the U.S. Department of Health and Human Services and the U.S. Department of Education, SC alleges she is covered by the prohibitions of the Act. SC also alleges that the violation is of the scope and effect to warrant her removal from employment with the State of Maryland under 5 U.S.C. § 1505. n1

n1 Once a violation of the Hatch Act has been established there are only two alternatives: removal or no penalty. *Special Counsel v. Suso*, 26 M.S.P.R. 673, 679, n.11 (1985).

Oral hearing was held in Baltimore, Maryland, on May 28 and 29 and June 3, 1992. All parties appeared and were represented. Post-hearing briefs have been filed. My recommendation is based upon the record as a whole.

#### THE STATUTE

The pertinent law, Section 1502, provides:

(a) A state or local officer or employee may not --

\* \* \*

(3) be a candidate for elective office. n2

n2 A nonpartisan candidate is excepted under 5 U.S.C. § 1502(a)(3). Respondent here was a candidate for the nomination of the Democratic party and for that reason was engaged in a partisan election. *Special Counsel v. Mahnke, et al.*, MSPB Docket No. CB1216910004T1 (April 23, 1992).

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The definition of "state or local officer or employee" is set out in 5 U.S.C. § 1501(4). It reads:

an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency. . . .

#### [\*281] BACKGROUND

Lisa Williams has been employed by the State of Maryland since 1987. She was hired -- and since then has been employed -- as Executive Assistant to the Director of what was then the Governor's Office for Handicapped Individuals -- now known by virtue of a name change as the Governor's Office for Individuals With Disabilities (OID). (Tr. 31-32.) While parts of this state agency are funded federally (*see* Ex. P-28), conflicting viewpoints over the role played by Williams in connection with those funds form a central issue in this complaint.

In June 1990 Williams filed with the State Administrative Board of Election Laws a Certificate of Candidacy for Nomination for Member of the House of Delegates for the purpose of having her name placed on the official ballot as a Democratic candidate in the primary election [\*\*7] to be held on September 11, 1990. She later became a candidate in that election but was unsuccessful. (Exs. R-5, 7-10.)

Prior to launching her election effort, Williams had been given the impression from state officials that she was free to become a candidate. Still, she was cautioned to remain sensitive about any possible conflict of interest. (Exs. R-5-6.) The Office of Special Counsel, however, did not at all agree that she was free to run owing to the fact that her position as Executive Assistant had duties connected to federal funds. Moreover, once petitioner became aware of her planned candidacy, SC sent several warning letters to Williams explaining petitioner's opinion that the facts known would

warrant a finding that she was in violation of the Hatch Act. These letters were sent between June and August of 1990 and cautioned Williams about the possible consequences of her continued candidacy, namely, removal from her employment with the state. (Exs. P-29, 31, 33.) These caveats did not deter Williams from actively proceeding with her candidacy.

The Directorate -- OID -- functions as the administrative head of various programs. Among them are the Governor's Committee [\*\*8] for the Employment of Persons with Disabilities (GCEPD), the Developmental Disabilities Counsel (DDC), and the Technology Assistance Program (TAP). Funding of these programs named varies. OID and GCEPD are funded by the state. DDC and TAP are federally funded. (Tr. 39, 41, 46, 114.) DDC receives all its funding from the United States Department of Health and Human Services (Tr. 215, 234-35), while TAP receives its funding from the U.S. Department of Education. (Tr. 215.) At that, OID is directly responsible for proper administration of federal grant awards. (Tr. 37, 40, 68, 108, 131; Ex. R-13.)

[\*282] DDC is the organization within OID whose purpose is defined by the Federal Disabilities and Assistance Bill of Rights Act. (Tr. 411.) Federally funded, DDC is essentially self-contained. (Tr. 418-19.) However, federal DDC invoices, timesheets, bills and the like are funnelled through OID, there consolidated and forwarded for payment to the State Financial Administration Office. (Tr. 414.) OID always "signs off" on DDC's financial status report as mandated by federal law. (Tr. 129-31, 423; Ex. P-26.)

TAP similarly is a program within OID which is federally funded and [\*\*9] under personnel and managerial control of OID in much the same manner as DDC. (Tr. 188, 199.)

#### BRIEFS

Petitioner, on brief, emphasizes that the pivotal issue in this complaint is whether respondent is covered by the prohibitions of the Act. She contends jurisdiction over Williams is established in two respects. First, because Williams holds a position of considerable importance in an agency which derives more than half of its funding from the Federal Government. And for the added reason that, at times, Williams has been personally responsible for the administration and disbursement of federal funds within her agency.

Petitioner also maintains that the conspicuous violation shown warrants removal because respondent has not introduced any facts in mitigation.

In her Post-Hearing Brief respondent presents the following generic arguments:

(1) petitioner has not carried her burden to show that respondent's principal employment is in connection with a federally-funded activity;

(2) application of the Hatch Act to the factual predicate at hand is unconstitutional; n3 and

n3 The Board has no authority to sustain challenges to the constitutionality of the Act. Still, sturdy and consistent precedent establishes the validity of this law. *See, e.g., Oklahoma v. United States Civil Service Commission, 330 U.S. 127 (1947).*

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(3) even if a violation is found, removal is not warranted.

She maintains that holding her covered by the Hatch Act would not satisfy the congressional intent underscoring its enactment, would serve no compelling interest and even deprives her of her right to participate in the election process.

Assuming that jurisdiction is nonetheless found, Williams maintains removal is not called for under the facts developed.

## [\*283] ANALYSIS

Petitioner carries the burden of showing, by the preponderant evidence, all the elements of the violation as charged. *Special Counsel v. Purnell*, 37 M.S.P.R. 184, 188 (1988), *aff'd sub nom. Fela v. U.S. Merit Systems Protection Bd.*, 730 F. Supp. 779 (N.D. Ohio 1989). This complaint turns on the question whether respondent was, during her candidacy in 1990, a covered employee for there is no dispute that Williams was a partisan candidate for elective office. I find SC has suitably carried her burden.

At the outset of this discussion, I emphasize, and find, that the source of her salary -- be it state or federal -- is not a relevant consideration. The controlling concept n4 is that:

An officer or [\*\*11] employee of a state or local agency is subject to the Act if, as a normal and foreseeable incident to her principal job or position, she performs duties in connection with an activity financed in whole or in part by federal loans or grants: otherwise she is not.

n4 As this Board explained in *Special Counsel v. Gallagher*, 44 M.S.P.R. 57, 61 (1990).

That respondent was employed by a state agency is not contested. As mentioned, respondent's job or position was with the State of Maryland where she carried the title of Executive Assistant in what is now OID. (See Ex. P-1.) A full-time position -- this was her main or principal employment with the state. (Tr. 245.) The Department of Personnel of Maryland established a position description (PD) for that position while Williams encumbered it. (Ex. P-1.) And there is no indication that she had any other employment.

What is hotly contested is whether this employment "is in connection with an activity" federally financed. Central to respondent's defense is that she had no -- or at least an insignificant -- connection with federally-funded activities and therefore is not covered by this law.

A logical place [\*\*12] to find out what duties Williams could be expected to perform as Executive Assistant is in the PD for that role. The PD explains that it has been established to describe the major duties and responsibilities assigned to the Executive Assistant. Inasmuch as the PD delineates her actual and potential assignments within the organization I find it sets forth those duties which Williams can be expected to perform as "a normal and foreseeable incident to her principal job" as Executive Assistant.

With that, my analysis now turns to the question whether these delineated duties are "in connection with" an activity financed in whole or in part by federal loans or grants. Preponderant evidence [\*284] shows that they are. In its general description of the duties and responsibilities of the Executive Assistant, the PD provides that employee's main purpose is:

To assist the Director in the administration and management of state mandated agency that exists to improve the quality of life for individuals who are disabled.

The PD then goes on to particularize some of those duties and responsibilities. Included are the duties of the Executive Assistant to:

. . . Analyze, review [\*\*13] and recommend state policies and procedures to determine compliance with applicable state and federal law.

\* \* \*

. . . Review proposed state and federal legislation to determine their impact on disabled citizens.

\* \* \*

. . . Review state, local and private grant applications for compliance with federal and state law.

\* \* \*

Not just that, but the incumbent of the position could be called upon to make decisions such as to:

. . . Determine if state policies and/or procedures comply with applicable state/federal mandates.

The PD goes on to explain that among the outside contacts required by the position are those dealing with "high level government officials at the local, state and federal levels." *Id.*

The aforementioned extracts from the PD under which Williams performed demonstrate that she simply could not perform her duties as Executive Assistant without in some way coming into direct contact with federally-funded activities. The PD itself establishes that, as part of her normal and foreseeable duties, her employment is in connection with activities federally funded.

This alone might well establish jurisdiction. Yet, there is more. Even though not [\*\*14] all subprograms in OID are federally funded, two are -- DDC and TAP. Both are under the administrative direction and control of the OID Director. Thus is the federal connection clear. Because the Executive Assistant is to assist the Director in the administration of this agency, I believe it logically and necessarily follows that the duties of the Executive Assistant also have the requisite connection. As Executive Assistant, the duties of Williams are closely aligned to the general business affairs of her agency -- OID. Hardly inconsequential, these duties include the obligation to perform in the absence of the Director. (Ex. P-16.) And, as this record shows, Williams has so acted.

[\*285] Williams has signed invoices; Grant Payment Request forms; and time and attendance reports. (Tr. 67-74; 88-90, 96-98, 107.) In so doing she was authorizing the payment of federal funds. (Tr. 70, 75, 87, 93, 98.) She bears responsibility for the preparation of the OID Annual Report which includes the subprograms of DDC and TAP; she coordinates the agency Information and Referral Service; and even may be called upon to testify about OID. She prepares press releases and answers questions [\*\*15] created by these releases. She even represented the Government and appeared on one occasion as the OID representative during budget review sessions with the Governor. (Tr. 112-23.) The conclusion that as a normal and foreseeable incident to her principal job she performs duties in connection with federally-financed activities is supported factually.

That Williams performed many -- if indeed not the bulk -- of her duties wholly apart from federal funds is not open to question. And were she to exercise no function in connection with federal funds, Williams would not be covered by the Hatch Act. 5 U.S.C. § 1501(4)(A). Besides, were her federally-related functions -- normal or foreseeable -- found to be merely casual or accidental, there would be no coverage. What is more, there is no doubt that the federal connection is here shown is not as strong as where a supervisor with direct fiscal responsibility over federal funds is charged. Nevertheless, the Hatch Act's reach is long, long enough in my judgment to touch respondent Williams who, as the facts show, as a normal and foreseeable incident to her job as Executive Assistant, performs duties in connection [\*\*16] with federally-funded activities. Upon consideration of the fact that respondent's officially defined duties have a federal hue, and relying on the concept that the Hatch Act is remedial in character, and is to be liberally construed, I find her duties are within the contemplation of the Act as in connection with an activity funded federally. The totality of her duties in connection with federally-funded activities are somewhat more than mere casual or perfunctory.

#### PENALTY

As mentioned, if any penalty for violating 5 U.S.C. § 1502(a) is to be imposed, it must be removal. Determination of whether removal is appropriate focuses on the state employee who violated the Hatch Act. Once a violation has been shown, the burden of producing evidence showing that the removal penalty is not warranted shifts to Williams. *Purnell*, 32 M.S.P.R. at 200.

Candidacy, as here, is a substantial and conspicuous infraction because it is a *per se* violation of the statute. *Special Counsel v. Brondyk*, 42 M.S.P.R. 333 (1989). Usually such a violation warrants [\*286] removal unless there is a basis for mitigation. *Id.* at 339. [\*\*17] As noted in *Special Counsel v. Purnell*, *supra* at 200, the Board recognized that appropriate mitigation factors vary from case to case. Among the factors typically warranting consideration are: (a) the nature of the offense and the extent of the employee's participation; (b) the employee's motive and intent; (c) whether the employee has received advice of counsel regarding the activities in issue; (d) whether the employee had ceased the activities; (e) the employee's past employment record; and (f) the political coloring of the employee's activities.

The offense here is serious and partisan in color. Even though Williams did have some advice suggesting her candidacy was permissible, SC warned her on three separate occasions that she was covered by the law and was risking removal by continuing. That she chose to rely on erroneous advice does not preclude imposition of the penalty of removal. *Special Counsel v. Mahnke, et al.*, MSPB Docket No. CB1216910004T1 (April 23, 1992). This is a *per se* violation. Williams ignored warnings by the very agency authorized by Congress to issue authoritative advice about the Hatch Act. 5 U.S.C.A. § 1221 [\*\*18] (f); 5 C.F.R. § 1800.3. She forged ahead actively seeking election thereby aggravating her offense.

Williams has not run again. And I will accept the fact that there is no cloud on her past employment record. Still, these favorable factors hardly outweigh the offsetting considerations which warrant her removal. Her violation was serious, conspicuous and at odds with written warnings given by the very agency which oversees the Hatch Act. Mitigation has not been shown warranted: this violation is of such scope and effect as to warrant removal. Her insistence that her candidacy was not an abuse of her state position is beside the point for it is not an element of proof in a Hatch Act complaint nor is the absence of actual harm to the state a matter for mitigation. *Special Counsel v. Winkleman*, 36 M.S.P.R. 71 73 (1988).

#### FINDINGS

Upon consideration of the entire record I find that preponderant evidence establishes that Lisa B. Williams violated 5 U.S.C. § 1502(a)(3) as alleged, and that her violation was of such scope and effect as to warrant her removal from her position as Executive Assistant in the Governor's Office for Individuals [\*\*19] with Disabilities with the State of Maryland.

The parties have 35 days after the date of service of this recommended decision to file any exceptions. Replies to exceptions are due within 25 days of the date of service of exceptions. Exceptions and replies should be filed with the Office of the Clerk, [\*287] Merit Systems Protection Board, 1120 Vermont Avenue, NW., Suite 806, Washington, DC 20419. 5 C.F.R. § 1201.129(b)(c).

Edward J. Reidy, Chief Administrative Law Judge

Washington, D.C.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Agency Relationships Causes of Action & Remedies Burdens of Proof Governments Federal Government Employees & Officials Governments Local Governments Elections